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Supreme Court, U.S.
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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

MEIRL GILBERT NEAL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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52 pp

QUESTION PRESENTED FOR REVIEW

DOES THE AMENDMENT TO THE GUIDELINES ESTABLISHING PRESUMPTIVE WEIGHT OF LSD FOR PURPOSES OF ESTABLISHING A BASE OFFENSE LEVEL FOR VIOLATIONS INVOLVING LSD, CHANGE THE MANNER OF COMPUTING THE WEIGHT OF LSD FOR PURPOSES OF THE STATUTE IMPOSING MINIMUM SENTENCE FOR POSSESSION OR DISTRIBUTION?

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IN THE
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MEIRL GILBERT NEAL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, MEIRL GILBERT NEAL, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit which misapplied the Sentencing Guidelines by including the actual weight of the LSD carrier medium in ascertaining whether the Petitioner merited a mandatory minimum sentence.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as United States v. Neal, 46 F.3d 1405 (7th Cir. 1995), and appears in Appendix A to this Petition. The amended judgment of the District Court for the Central District of Illinois appears in Appendix B to this Petition. The judgment of the District Court for the Central District of Illinois appears in Appendix C to this Petition.

JURISDICTION

The Court of Appeals' opinion in this matter was filed on February 2, 1995. No Petition for Rehearing was filed in the Court of Appeals. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

Amendment V to the United States Constitution is set forth in Appendix D.

Title 21 U.S.C. § 841(b)(1)(A)(v) is set forth in Appendix E.

U.S.S.G. §2D1.1(c) is set forth in Appendix F.

STATEMENT OF THE CASE

The United States District Court for the Central District of Illinois, Springfield Division, the Court of first instance, had jurisdiction pursuant to Title 21 U.S.C. § 846 and Title 21 U.S.C. § 841(a)(1), and 18 U.S.C. § 3231 which provides District Courts

with exclusive jurisdiction of offenses against the United States. Jurisdiction in the present Petition was conferred by 18 U.S.C. § 3582(c)(2).

Until recently, the Sentencing Guidelines also used the entire weight of the "mixture or substance," including the weight of the carrier medium, to determine the applicable sentencing range for crimes involving LSD. See U.S.S.G. § 2D1.1 and commentary. Effective November 1, 1993, however, the united States Sentencing Commission amended § 2D1.1 by prescribing a uniform (and somewhat less stringent) formula for calculating LSD quantity. See United States v. Boot, 25 F.3d 52, 54 (1st Cir. 1994). The new Guideline approach (amendment 488) establishes a presumptive weight of 0.4 milligrams per dose of LSD, regardless of the carrier medium. U.S.S.G. § 2D1.1. The district courts have discretion to apply this new formula retroactively, see 18 U.S.C. § 3582(c)(2); U.S.S.G. § 1B1.10(a) & (d), so that in appropriate circumstances a defendant may be considered for a reduction in a previously imposed sentence. United States v. Holmes, 13 F.3d 1217, 1222 (8th Cir. 1994).

On May 26, 1988 the Petitioner was charged in a Indictment with Count I charging conspiracy and distribution of LSD (10 grams or more), in violation of 21 U.S.C. § 846, and in Count II of possession with intent to distribute LSD (10 grams or more), in violation of 21 U.S.C. § 841(a)(1). The Petitioner plead guilty to both counts on February 13, 1989.

At sentencing, the district court held Neal accountable for blotter paper containing 11,456 doses of "hits" of LSD. The actual weight (including the carrier medium) of the 11,456 doses that Neal had possessed and conspired to distribute was 109.51 grams. This weight gave Neal, who fell int the Criminal History III category because of prior drunk driving convictions a base offense level of 36. The offense level was reduced by two points for Neal's acceptance of responsibility, resulting in a final offense level of 34 and a sentencing range of 188 to 235 months. Accordingly, the district court sentenced Neal to 192 months of imprisonment on each count (the sentences to run concurrently) and five years of supervised release.

On December 10, 1993, Neal filed a pro se motion to reduce his sentence because of the intervening amendment to the Sentencing Guidelines. The district court elected to apply the amendment retroactively and recalculated the weight of the 11,456 doses as 4.58 grams. The recalculation gave neal a base offense level of 28. Subtracting three points for acceptance of responsibility (Neal was allowed an additional one-point reduction for a timely plea), the district court placed Neal at a final offenses level of 25, which provides in the Criminal History III category a sentencing range of 70 to 87 months.

However, the district court held that it had to follow the Chapman definition of "mixture or substance" in calculating the weight of the LSD for determining the applicability of any minimum penalty under § 841(b)(1). The weight of the LSD blotter paper for

which Neal was convicted, 109.51 grams, mandated a minimum sentence of ten years. 846 F.Supp. 1362. 21 U.S.C. § 841(b)(1)(A)(v) (providing for a mandatory minimum ten year sentence for conviction involving more than 10 grams of LSD); U.S.S.G. § 5G1.1(b). The court therefore set Neal's sentence at 120 months. Neal objected, asserting that court should have used the 4.58 gram calculation, which would require a mandatory minimum of only five years for a conviction involving more than one gram of LSD, 21 U.S.C. § 841(b)(1)(B)(v), and allow the court to impose a sentence between 70 and 87 months.

The Petitioner thereafter appealed the amended judgment sentence to the United States Court of Appeals for the Seventh Circuit. Petitioner reargued before the Court of Appeals, en banc, that the District Court misapplied the Sentencing Guidelines by including the actual weight of the LSD carrier medium in ascertaining that the Petitioner merited a mandatory minimum sentence.

The Petitioner made three basic arguments for using the per dose weight calculation instead of the total weight calculation prescribed in Chapman v. U.S. 500 U.S. 453, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991), in deciding whether to impose a mandatory minimum penalty for his conduct under 21 U.S.C. § 841(b)(1). First the Petitioner argued that the presumptive weight approach reflected in U.S.S.G. § 2D1.1, as amended, applies to the determination of both a defendant's base offense level and his eligibility for the statutory mandatory minimum sentence. The

Petitioner argued that Chapman supra, does not conflict with this interpretation because Congress, through its inaction, has accepted the Guidelines amendment as the authoritative definition of the phrase "mixture or substance" for purposes of both the Guidelines and the mandatory minimum sentencing scheme. The Petitioner also maintains that to the extent Chapman supra, requires inclusion of the weight of the carrier medium, the amended Guidelines' weight calculation does include, in part, the weight of the carrier and is thus merely an application of Chapman supra. Second, the Petitioner argued that the "dual weight" sentencing scheme used by the district court is so illogical and unjust that it violates the Due Process Clause. Third, the Petitioner contended that the dual method of weight calculation under the amended Guidelines creates an ambiguity that required the Seventh Circuit to invoke the rule of lenity and impose a lesser punishment.

The Seventh Circuit addressed each argument and held that the District Court applied the relevant statute and guideline as both Congress and the Commission intended, that the rule of lenity does not apply and that using a presumptive weight to calculate the base offense level and using the actual weight to determine eligibility for the mandatory minimum sentence is a rational scheme and does not violate due process.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons: This Petition presents an issue resolved by the Seventh Circuit and other Circuits which have construed U.S.S.G. § 2D1.1, as amended to determine that the retro amendment should not be used to calculate the weight of the subject LSD to determine whether a case falls under the statutory mandatory minimum sentence provision. Secondly, using a presumptive weight to calculate the base offense level and the actual weight to determine eligibility for the mandatory minimum sentence creates and illogical and arbitrary distinction between defendants that violates the due process clause of the Fifth Amendment. This Petition presents issues not specifically and unequivocally decided by this Court, and the manner in which the Seventh Circuit has construed the amendment is contrary to the intention of Congress and the plain meaning proposed effect of the amendment.

Here, the Seventh Circuit found that the presumptive weight approach reflected in U.S.S.G. § 2D1.1, as amended, applies to the determination of both a defendant's base offense level and his eligibility for the statutory mandatory minimum sentence. In addition, the following Circuits have addressed this issue in holding or dictum and have arrived at the same conclusion as the Seventh Circuit[1]

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[1]First Circuit: United States v. Dimeo, 28 F.3d 240, 241 (1st Cir. 1994); Fifth Circuit: United States v. Pardue, 36 F.3d 429, 431 (5th Cir. 1994); Sixth Circuit: Cox v. United States, No. 94-3041, 1994 WL 443250, at **2, 1994 U.S. App. Lexis 22188, at *4 (6th Cir. Aug. 16, 1994); Seventh Circuit: United States v. Sassi, No. 94-1363, 1994 WL 450134, 1994 U.S. App. Lexis 22932 (7th Cir. Aug. 22, 1994); Eighth Circuit: United States v. Stoneking, 34 F.3d 651 (8th Cir. 1994); Tenth Circuit: United States v. Mueller,

To fully understand the significant legal issues in dispute in this case, Petitioner respectfully suggests it is useful to identify what is not at issue. It is clear beyond dispute that U.S.S.G. § 5G1.1(b) requires that where a mandatory minimum sentence applies, and such mandatory minimum is greater than the applicable guideline sentence, the mandatory minimum controls. This rule is simple to apply when the drug quantity is such that it brings into play a mandatory minimum sentence as well as guideline range. Obviously, until now, the drug quantity used for both purposes was the same. What this Court has the opportunity to decide, however, is whether it is permissible, logical, just, or indeed intended by Congress, or by the Sentencing Commission, to use one method of calculating weight for guideline sentencing and a completely different method of calculating weight of the exact quantity of drug found to be involved in the crime for purposes of determining whether a mandatory minimum sentence applies.

The mandatory minimum sentences already enhance penalties above those established by the Sentencing Commission in certain situations. To further enhance drug amounts used for mandatory minimum determination only provides a multiplying enhancement far and above the guidelines. Such a disparity was never wanted nor intended by Congress, the Commission or the courts.

The disparate effect of mandatory minimums is further distorted by applying a greater weight for the mandatory minimum purposes than for guideline purposes were the same actual quantity

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27 F. 3d 494, 496-97 (10th Cir. 1994). Two Circuits have reserved ruling on the question: Ninth Circuit: United States v. Staufer, 38 F.3d 1103, 1108 n.2 (9th Cir. 1994); Eleventh Circuit: United States v. Smith, 39 F.3d 1143, 1146 n.2 (11th Cir. 1994)

is involved in both cases. Utilizing the guideline formula does not conflict with the holding of this Court in Chapman v. United States, 500 U.S. 453, 111 S.Ct. 114 L.ed.2d 524 1919 (7th Cir. 1991) as suggested by the Seventh Circuit.

In determining the appropriate sentencing methodology, it must begin with the statute. Section 841(a) of Title 21 proscribes the distribution of certain substances including LSD. Section 841(b)(1)(B)(v) establishes a mandatory minimum sentence for the distribution of certain amounts of a "mixture of substance" containing a detectible amount of LSD. Pursuant to statutory authority, 28 U.S.C. § 994(p), to said sentencing ranges for the distribution of contraband substances, the United States Sentencing Commission has set a range of terms of imprisonment for violations of the statute. These terms of imprisonment are correlated to the weight of controlled substance. Section 2D1.1(c) was amended on November 1, 1993 in the notes following the Drug Quantity Table by inserting the following additional paragraph at the end:

> In the case of LSD on a carrier media (e.g., a sheet of blotter paper), do not use the weight of the LSD/carrier media. Instead, treat each dose of LSD on the carrier media as equal to 0.4 mg. of LSD for the purposes of the Drug Quantity Table.

Thus, the Petitioner, argues that the Commission by inference indicated that the per dose weight calculation (presumptive weight approach) should be utilized to determine whether a mandatory minimum sentence should be imposed and Congress approved it by its silence as to the amendment to U.S.S.G. § 2D1.1(c). The Seventh Circuit and the other Circuits have misconstrued the amendment. To

adopt the argument of the Petitioner fully takes into account this Court's interpretation of § 841(b) in Chapman, supra, with respect to the mandatory minimum sentence provision.

The dissent in the Seventh Circuit opinion authored by Circuit Judge Ripple eloquently stated this contention when he said:

> In the "Background" Commentary to § 2D1.1 in selecting 0.4 mg, the Commissioners noted that this weight exceeded the standard dosage unit of 0.05 mg for pure LSD as calculated by the Drug Enforcement Administration. It justified that higher weight on the ground that justice required that the carrier medium be calculated evenhandedly into the sentencing determination. The Commission gave two reasons for this inclusion of the carrier medium: (1) The weight of most controlled substances in the Drug Quantity Table includes the amount of a carrier medium; (2) In Chapman v. United States, 500 U.S. 453 (1991), the Supreme Court interpreted the statutory section imposing a mandatory minimum sentence for the distribution of a single gram or more of a mixture or substance containing LSD to require the inclusion of the carrier medium within the weight calculation. Therefore, inpromulgating this method of calculating the weight of LSD in Amendment 488 after the Supreme Court's decision in Chapman, the Commission expressly addressed the need to comply with the Supreme Court's interpretation of the statute in Chapman. Congress, having been explicitly advised of this change and of the Commission's interpretation of the Supreme Court's reading of the statute, took no action to countermand the Commission's promulgation. Therefore, the Sentencing Guideline's § 2D1.1(c), as revised by Amendment 488, is consistent with 21 U.S.C. § 841(b). It fully takes into account the Supreme Court's interpretation of § 841(b) in Chapman with respect to the mandatory minimum sentence provision. Accordingly, it should govern the weight calculations of controlled substances for sentencing determinations.
>
> 46 F.3d at 1412.

Chapman, supra, does not mandate the result reached by the Seventh Circuit or any of the other Circuits. Chapman, supra, decided whether eligibility for the mandatory minimum sentence under 21 U.S.C. § 841(b) was to be determined but the weight of the pure LSD or of the carrier medium containing the LSD. It held that the mandatory minimum statute required the weight of the carrier needed to be included when determining the sentence. Faced with

counting the negligible weight of the pure LSD or the weight of the carrier the Court could only chose the weight of the carrier with the pure drug.

Finally, as to the appropriate construction of the guideline amendment regarding its practicable effect to avoid injustice in determining the intent of Congress and the Commission Justice Ripple stated in his dissent in the opinion below that:

> Any lingering doubt as to the appropriate reading of the guideline commentary ought to be dispelled by an examination of the practical effect of the majority's interpretation. Under the "dual weight" method of calculation, an LSD trafficker would receive the mandatory minimum sentence of five years for one gram or more of LSD by selling LSD in approximately one-half of a sugar cube or 125 blotter paper squares. See U.S.S.G. amend. 488 (noting that average weights of sugar cube and blotter square are 2000 mg and 8 mg. respectively); cf Chapman, 500 U.S. at 458 n.2 (reproducing chart in which weights of various carrier media are listed; using these weights, a dealer could qualify for the five-year mandatory minimum by selling LSD in approximately one-half of a sugar cube, 72 blotter paper squares, or 445 gelatin capsules). By contrast, under the Sentencing Commission's method, whether as LSD trafficker receives the five-year mandatory minimum sentence will not depend on the type of medium he happens to use but on the number of doses he sells.
>
> 46 F.3d 1414.

Petitioner also asserts that if such an artificial distinction is applied to the defendant, it would lead to an artificial disparity in sentencing, in violation of the Rule of Lenity which requires an ambiguous statute of this type to be interpreted in the defendant's favor. See United States v. Bass 404 U.S. 336 (1971); Callanan v. United States, 364 U.S. 587 (1961); Moskal v. United States, 498 U.S. 103 (1990). Therefore, the Rule of Lenity should be imposed requiring the amendment's prescriptive weight approach to determine the Petitioner's eligibility for a mandatory minimum sentence.

Similarly, creating an artificial distinction for purposes of enhancing a sentence is a violation of the due process clause of the Fifth Amendment. Marshall v. United States, 414 U.S. 417 (1974).

The Petitioner further contends that using a presumptive weight to calculate the base offense level and the actual weight to determine eligibility for the mandatory minimum sentence creates an illogical and arbitrary distinction between defendants that violates the Due Process Clause of the Fifth Amendment.

It has been held that an irrational federal sentencing scheme denies equal protection of the laws and violates the due process clause of the Fifth Amendment. Marshall v. United States, 414 U.S. 417 (1974). Under this standard, if a distinction is made in a sentencing statute, a rational basis must be established to support that distinction. McGinnis v. Royster, 410 U.S. 263 (1973). The holding of the Seventh Circuit creates an arbitrary distinction by establishing one method of calculating the weight of LSD for guidelines purposes and a completely different method for mandatory minimum purposes, which has the effect of dramatically increasing the difference between mandatory minimum sentences and guideline sentences which are drastically reduced.

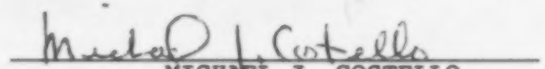
This Court should grant certiorari here to explicitly rule that a per dose weight calculation instead of the Chapman, supra, weight calculation should be used in deciding whether to impose a mandatory minimum penalty under 21 U.S.C. § 841(b)(1) pertaining to LSD.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.

DATED: May 1, 1995.

Respectfully submitted,



MICHAEL J. COSTELLO
Attorney for Petitioner

AMENDMENT V TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

Title 21 U.S.C. § 841(b)(1)(A)(v)

(b) Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:. . .

(1)(A) In the case of a violation of subsection (a) of this section involving-. . .

> (v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);. . .

such a person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provision of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both.

APPENDIX E

U.S.S.G. § 2D1.1(c)

§ 2D1.1(c) is amended in the notes following the Drug Quantity Table by inserting the following additional paragraph at the end:

> In the case of LSD on a carrier medium (e.g., a sheet of blotter papér), do not use the weight of the LSD carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table."

The Commentary to Sec. 2D1.1 captioned "Application Notes" is amended by inserting the following additional note:

> LSD on a blotter paper carrier medium typically is marked s that the number of doses ("hits") per sheet readily can be determined. When this is not the case, it is to be presumed that each 1/4 inch by 1/4 inch section of the blotter paper is equal to one dose.
>
> In the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted."

The Commentary to Sec. 2D1.1 captioned "Background" is amended by inserting the following paragraphs at the end:

> Because the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself, the Commission has determined that basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD (but different carrier weights), as well as sentences disproportionate to those for other, more dangerous controlled substances, such as PCP. Consequently, in cases involving LSD contained in a carrier medium, the Commission has established a weight per dose of 0.4 milligram for purposes of determining the base offense level.
>
> The dosage weight of LSD selected exceeds the Drug Enforcement Administrations's standard dosage unit for LSD of 0.05 milligram (i.e., the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard t purity, and (B) the decision in Chapman v. United States, 111 S.Ct. 1919 (1991) (holding that the term "mixture of substance" in 21 U.S.C. Sec. 841(b)(1) includes the carrier medium in which LSD is absorbed). At the same time, the weight per dose

APPENDIX F

selected is less than the weight per dose that would equate the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD> (Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent to those for PCP.) Thus, the approach decided upon by the commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. Nonetheless, this approach does not override the applicability of 'mixture of substance" for the purpose of applying any mandatory minimum sentence (see Chapman; Sec.5G1.(b))."

Reason for Amendment: The Commission has found that the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself (e.g., LSD is typically placed on blotter paper which generally weights rom 5 to 10 milligrams per dose; the weight of the LSD itself per dose is generally from 0.02 to 0.08 milligram; the Drug Enforcement administration describes a standard dose of LSD as containing 0.05 milligram of LSD). as a result, basing the offense level on the entire weight of the LSD and carrier medium produces unwarranted disparity among offenses involving the same quantity of actual LSD but different carrier weights, as well as sentences that are disproportionate to those for other, more dangerous controlled substances, such as PCP, heroin, and cocaine. Under the guidelines prior to the amendment, for example, 100 grams of heroin or 500 grams of cocaine (weights that correspond to several thousand doses, the number depending upon the purity) result in the same offense level as 125 doses of LSD on blotter paper (which has an average weight of 8 milligrams per dose) or 1 dose of LSD on a sugar cube (2000 milligrams per dose).

Consequently, in cases involving LSD contained i a carrier medium, this amendment establishes a weight per dose of 0.4 milligram to be used for purposes of determining the base offense level. the dosage weight of LSD selected by the Commission exceeds the Drug Enforcement Administration's standard dosage unit for LSD of 0.05 milligram (i.e., the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on aa carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard to purity, and (B) the decision in Chapman v. United States, 111 S. Ct. 1919 (1991) (holding that the term "mixture of substance" in 21 U.S.C. Sec. 841(b)(1) includes the carrier medium in which LSD is absorbed). at the same time, the weight per dose selected is less than the weight per dose that would equate the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. Treating LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent t those for PCP (for example, 2000 doses of LSD at 0.5 milligram per dose equals 1 gram of LSD - corresponding to the lower limit of offense level 26; similarly, 2000 doses of PCP at 5 milligrams per dose, the standard amount of actual PCP in a dose,equals 10 grams of actual PCP - corresponding to the lower limit of offense level 26). Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. Nonetheless, this approach does not override the definition of mixture or substance for purposes of applying any mandatory minimum sentence (see Chapman; Sec. 5G1.1(b)).

to the Funds' attorneys' fee award. Furthermore, the district court is directed to award reasonable attorneys' fees to the Funds in connection with this appeal in an amount to be determined by the district court.

UNITED STATES of America, Plaintiff-Appellee,

v.

Meirl Gilbert NEAL, Defendant-Appellant.

No. 94-1773.

United States Court of Appeals, Seventh Circuit.

Argued Sept. 22, 1994.

Reargued En Banc Nov. 22, 1994.

Decided Feb. 2, 1995.

Defendant was convicted of conspiracy to distribute and possession with intent to distribute LSD-laced water paper laced with lysergic acid diethylamide (LSD), in the United States District Court for the Central District of Illinois, Richard Mills, J., 846 F.Supp. 1362. Defendant appealed his sentence. The Court of Appeals, Flaum, Circuit Judge, held that amendment to guidelines, establishing presumpcive weight of LSD for purposes of establishing base offense level for violations involving drug, did not change manner of computing weight of LSD for purposes of statute imposing minimum sentence for possession or distribution.

Affirmed.

Ripple, Circuit Judge, dissented and filed opinion with which Cummings and Ilana Diamond Rovner, Circuit Judges, joined.

1. Drugs and Narcotics ⇐133

Amendment of Sentencing Guidelines, provide that there would be a presumptive weight of 0.4 milligrams per dose of lysergic acid diethylamide (LSD), did not change basis for determining quantity of LSD that would require imposition of mandatory minimum sentence under statute, which continued to be based upon weight of LSD and medium in which it was transmitted. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b)(1), 21 U.S.C.A. § 841(b)(1); U.S.S.G. § 2D1.1, comment. (backg'd.), 18 U.S.C.A.

2. Constitutional Law ⇐251.3

Statute runs afoul of due process clause only if it manifests patently arbitrary classification, utterly lacking in rational justification. U.S.C.A. Const.Amend. 5.

3. Constitutional Law ⇐270(2)
Drugs and Narcotics ⇐133

Sentencing scheme under which presumptive weight of lysergic acid diethylamide (LSD) was used to calculate base offense level under Sentencing Guidelines, and actual weight including weight of carrier was used to determine eligibility for mandatory minimum sentence, did not create illogical and arbitrary distinction between defendants violating due process clause; minimum sentence was buttressed by rational objective of penalizing volume dealers of product, and to extent that person involved in sufficient doses to exceed minimum sentence threshold weight might receive much heavier sentence than dealer dispensing only a few less doses. it is up to Congress to deal with disparity and not courts. U.S.C.A. Const.Amend. 5; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b)(1), 21 U.S.C.A. § 841(b)(1); U.S.S.G. § 2D1.1, comment. (backg'd.), 18 U.S.C.A.

4. Drugs and Narcotics ⇐133

Rule of lenity would not be applied to resolve alleged ambiguity engendered by use of actual weight of lysergic acid diethylamide (LSD) and its carrier in determining eligibility for mandatory minimum sentence, and presumptive weight to calculate base offense level under Sentencing Guidelines; there was not ambiguity, as both statute and guidelines instructed court to impose minimum if weight of LSD plus carrier exceeded specified amount and consequence was not so absurd or glaringly unjust as to make court consider whether result comported with congressional intent. U.S.C.A. Const.Amend. 5; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b)(1), 21 U.S.C.A. § 841(b)(1); U.S.S.G. § 2D1.1, comment. (backg'd.), 18 U.S.C.A.

Byron G. Cudmore, Asst. U.S. Atty. (argued), Springfield, IL, for plaintiff-appellee.

Michael J. Costello (argued), Costello Law Office, Springfield, IL, for defendant-appellant.

Before POSNER, Chief Judge, and CUMMINGS, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, KANNE, and ROVNER, Circuit Judges.

FLAUM, Circuit Judge.

Defendant Meirl Gilbert Neal was convicted of conspiracy to distribute and possession with intent to distribute LSD-laced blotter paper and received a statutory minimum sentence of ten years imprisonment. Neal contests his sentencing, arguing that the district court misapplied the Sentencing Guidelines by including the actual weight of the LSD carrier medium in ascertaining whether Neal merited a mandatory minimum sentence. We hold that the district court properly calculated Neal's sentence and therefore affirm.

I.

Understanding Neal's objection to his sentence requires a brief history of Congress's and the Sentencing Commission's approach to drug-related sentencing. In 1986, Congress adopted a "market-oriented" approach to punishing drug trafficking, *see* Anti-Drug Abuse Act of 1986, Pub.L. 99-570, 100 Stat. 3207 (1986), aimed at punishing retail and wholesale dealers "according to the weight of the drugs in whatever form they were found—cut or uncut, pure or impure, ready for wholesale or ready for distribution at the retail level." *Chapman v. United States*, 500 U.S. 453, 461, 111 S.Ct. 1919, 1925, 114 L.Ed.2d 524 (1991). Acting under this principle, Congress set mandatory minimum sentences corresponding to the weight of a "mixture or substance containing a detectable amount" of various controlled substances, including LSD. *See id.* (citing 21 U.S.C. §§ 841(b)(1)(A)(i)–(viii) and (B)(i)–(viii)). The statutory provision at issue both here and in *Chapman*, 21 U.S.C. § 841(b)(1), provides for mandatory minimum sentences for distributing more than a certain amount of a "mixture or substance containing a detectable amount" of LSD. The Court, applying an "ordinary meaning" to the key terms "mixture" and "substance," concluded that the weight of the blotter paper containing LSD, and not the weight of the pure drug alone, determines eligibility for the mandatory minimum sentence. *See Chapman*, 500 U.S. at 461–63, 111 S.Ct. at 1925–26.

Until recently, the Sentencing Guidelines also used the entire weight of the "mixture or substance," including the weight of the carrier medium, to determine the applicable sentencing range for crimes involving LSD. *See* U.S.S.G. § 2D1.1 and commentary. Effective November 1, 1993, however, the United States Sentencing Commission amended § 2D1.1 by prescribing a uniform (and somewhat less stringent) formula for calculating LSD quantity. *See United States v. Boot*, 25 F.3d 32, 34 (1st Cir.1994). The new Guideline approach (Amendment 488) establishes a presumpcive weight of 0.4 milligrams per dose of LSD, regardless of the carrier medium. U.S.S.G. § 2D1.1. The district courts have discretion to apply this new formula retroactively, *see* 18 U.S.C. § 3582(c)(2); U.S.S.G. § 1B1.10(a) & (d), so that in appropriate circumstances a defendant may be considered for a reduction in a previously imposed sentence. *United States v. Holmes*, 13 F.3d 1217, 1222 (8th Cir.1994).

Defendant Neal was charged with conspiracy to distribute LSD, in violation of 21 U.S.C. § 846, and possession with intent to distribute LSD, in violation of 21 U.S.C. § 841(a)(1). Neal pleaded guilty to both counts on February 13, 1989. At sentencing, the district court held Neal accountable for blotter paper containing 11,456 doses or

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"hits" of LSD. The actual weight (including the carrier medium) of the 11,456 doses that Neal had possessed and conspired to distribute was 109.51 grams. This weight gave Neal, who fell into the Criminal History III category because of prior drunk driving convictions, a base offense level of 36. The offense level was reduced by two points for Neal's acceptance of responsibility, resulting in a final offense level of 34 and a sentencing range of 188 to 235 months. Accordingly, the district court sentenced Neal to 192 months of imprisonment on each count (the sentences to run concurrently) and five years of supervised release.

On December 10, 1993, Neal filed a pro se motion to reduce his sentence because of the intervening amendment to the Sentencing Guidelines. The district court elected to apply the amendment retroactively and recalculated the weight of the 11,456 doses as 4.58 grams. The recalculation gave Neal a base offense level of 28. Subtracting three points for acceptance of responsibility (Neal was allowed an additional one-point reduction for a timely plea), the district court placed Neal at a final offense level of 25, which provides in the Criminal History III category a sentencing range of 70 to 87 months.

However, the district court held that it had to follow the *Chapman* definition of "mixture or substance" in calculating the weight of the LSD for determining the applicability of any minimum penalty under § 841(b)(1). The weight of the LSD blotter paper for which Neal was convicted, 109.51 grams, mandated a minimum sentence of ten years. 846 F.Supp. 1282. 21 U.S.C. § 841(b)(1)(A)(v) (providing for a mandatory minimum ten year sentence for conviction involving more than 10 grams of LSD); U.S.S.G. § 5G1.1(b). The court therefore set Neal's sentence at 120 months. Neal objected, asserting that court should have used the 4.58 gram calculation, which would require a mandatory minimum of only five years for a conviction involving more than one gram of LSD. 21 U.S.C. § 841(b)(1)(B)(v), and allow the court to impose a sentence between 70 and 87 months. The court overruled Neal's objection and this appeal followed.

II.

The sole issue on appeal is whether the district court properly determined that an amendment to the Sentencing Guidelines prescribing a presumptive per dose weight of LSD applies to the calculation of a defendant's base offense level but not to his eligibility for a statutory mandatory minimum sentence.[1] An interpretation of the Guidelines and its amendments presents a question of law which we *review de novo*. *United States v. Jones*, 983 F.2d 1425, 1429 (7th Cir.1993). The particular question raised here is one of first impression in our circuit. *Cf. United States v. Tucker*, 20 F.3d 242, 244 (7th Cir.1994) (making reference to the presumptive weight for LSD under the Guidelines in the context of determining whether a defendant was subject to a mandatory minimum sentence for distribution of cocaine); *United States v. Sassi*, 23 F.3d 56 (7th Cir. 1994) (table) (unpublished opinion, text at 1994 WL 450134, 1994 U.S.App. LEXIS 30412) (disposing of similar issues without published opinion).

Neal makes three basic arguments for using the per-dose weight calculation instead of the *Chapman* weight calculation in deciding whether to impose a mandatory minimum penalty for Neal's conduct under 21 U.S.C. § 841(b)(1). First, Neal submits that the presumptive weight approach reflected in U.S.S.G. § 2D1.1, as amended, applies to the determination of both a defendant's base offense level and his eligibility for the statutory mandatory minimum sentence. Neal argues that *Chapman* does not conflict with this interpretation because Congress, through its inaction, has accepted the Guidelines amendment as the authoritative definition of the phrase "mixture or substance" for purposes of both the Guidelines and the mandatory minimum sentencing scheme. Neal also maintains that to the extent *Chapman* requires inclusion of the weight of the carrier medium, the amended Guidelines' weight calculation does include, in part, the weight of the carrier and is thus merely an application of *Chapman*. Second, Neal suggests that the "dual weight" sentencing scheme used by the district court is so illogical and unjust that it violates the Due Process Clause. Third, Neal contends that the dual method of weight calculation under the amended Guidelines creates an ambiguity that requires us to invoke the rule of lenity and impose a lesser punishment. We address each argument in turn.

1. Neal also challenges the enhancement of his criminal history because the court calculated it based on Neal's prior alcohol related driving offenses. Neal asserts that including such convictions, where the defendant was arguably an alcoholic and unable to control his drinking, violates due process and equal protection rights under the Fifth Amendment. The fact that we are upholding the mandatory minimum sentence renders the calculation of criminal history irrelevant and Neal's appeal on this point moot. We therefore express no opinion as to the merits of this argument.

A.

[1] Under the district court's interpretation of federal law, a single amount of LSD is assigned two different weights for sentencing purposes: one weight for determining the base offense level under the Guidelines and another weight for determining eligibility for the mandatory minimum sentence provided in 21 U.S.C. § 841(b)(1)(A)(v). The Guidelines, as the Supreme Court has observed, "were meant to establish a range of determinate sentences for categories of offenses and defendants according to various specified factors." *Mistretta v. United States*, 488 U.S. 361, 368, 109 S.Ct. 647, 653, 102 L.Ed.2d 714 (1989), in order to provide certainty and fairness and to eliminate unwarranted disparities in the sentences imposed upon similarly situated defendants. *See* 28 U.S.C. § 991(b)(1)(B). At the same time, however, the Commission itself has long recognized that Congress has been of two minds with respect to sentencing federal criminals:

> The sentencing guidelines system is essentially a system of finely calibrated sentences. For example, as the quantity of drugs increases, there is a proportional increase in the sentence. In marked contrast, the mandatory minimums are essentially a flat, tariff-like approach to sentencing. Whereas guidelines seek a smooth continuum, mandatory minimums result in "cliffs." The "cliffs" that result from mandatory minimums compromise proportionality, a fundamental premise for just punishment, and a primary goal of the Sentencing Reform Act.

United States Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (summary) (August 1991); *see also United States v. McFadden*, 13 F.3d 463, 467–68 (1st Cir.1994) (Breyer, C.J., dissenting) (noting that mandatory minimum statutes represent an "ad hoc derivation" from the more general policy reflected in the Sentencing Guidelines). Though they seem to make an odd pair, it must be noted that the Guidelines and statutory mandatory minimum scheme were enacted by Congress almost simultaneously and continue to coexist, and sometimes overlap. Indeed, the Guidelines specifically contemplate conflict between the two schemes, and direct that "[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence." U.S.S.G. § 5G1.1.

The post-amendment Commentary[2] to § 2D1.1 clearly indicates that the Commission promulgated Amendment 488 in full recognition that it would create a "dual weight" system of calculating the weight of LSD for sentencing purposes and that where the Guidelines approach conflicted with the statutory mandatory minimum scheme, the latter would prevail. The first paragraph of that Commentary notes that "in cases involving LSD contained in a carrier medium, the Commission has established a weight per dose of 0.4 milligrams *for purposes of determining the base offense level.*" U.S.S.G. § 2D1.1 Commentary (emphasis supplied). The Commentary concludes by stating that "this approach *does not override* the applica-

2. Commentary in the Guidelines, at least if it is interpreting a specific guideline, is to be given the same force and effect as the Guidelines language itself unless the Commentary "violates the Constitution or a federal statute, or it is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. United States*, — U.S. —, —, 113 S.Ct. 1913, 1920, 123 L.Ed.2d 598 (1993); *United States v. Lamb*, 6 F.3d 415, 420 (7th Cir.1993).

bility of 'mixture or substance' for the purpose of applying any mandatory minimum sentence," citing both *Chapman* and U.S.S.G. § 5G1.1(b). *Id.* Even if an amendment to the Sentencing Guidelines could supercede the Supreme Court's interpretation of a separate statute, these two sentences make clear that the amendment to § 2D1.1 purported to do no such thing. In any event, this is not a case like *McFadden*, in which we might "read language in different, but related, statutes, so as best to reconcile those statutes, in light of their purposes and of common sense." 13 F.3d at 467 (Breyer, C.J., dissenting) (arguing that the majority's interpretation of the word "use" in a statute (18 U.S.C. § 924(c)) prescribing a mandatory minimum sentence to encompass "possession" unnecessarily swallows up a guideline (U.S.S.G. § 2D1.1(b)(1)) that distinguishes among different kinds of drug- and gun-related criminal behavior). Here, the Supreme Court has authoritatively construed the term "mixture or substance" in 21 U.S.C. § 841(b)(1)[3] to mean that "[s]o long as it contains a detectable amount, the entire mixture or substance is to be weighed when calculating the sentence." *Chapman*, 500 U.S. at 459, 111 S.Ct. at 1924; *see also Boot*, 25 F.3d at 55 ("Until the Supreme Court or the Congress revisits the issue, *Chapman* governs the meaning of the term 'mixture or substance' in 21 U.S.C. § 841(b)(1)(B)(v), as the Commission itself acknowledged when it promulgated Amendment 488."). The Commission is without authority to override *Chapman*.[4] As Judge Easterbrook has noted, "[t]he Sentencing Reform Act creates only the power to guide judicial discretion within the statutory limits." *United States v. Seacott*, 15 F.3d 1380, 1392 (7th Cir.1994) (Easterbrook, J., concurring); it does not "vest in the Judicial Branch the legislative responsibility for establishing minimum and maximum penalties for every crime." *Mistretta*, 488 U.S. at 396, 109 S.Ct. at 667. Congress has authorized the Commission to permit sentences lower than mandatory minima, 18 U.S.C. § 3553(e), but only within the parameters laid out by that statutory provision. *See id.* (authorizing departures for substantial assistance to the government and for mitigating circumstances not adequately taken into consideration in the formulation of the Guidelines); *see also* U.S.S.G. § 5K2.0. The Commission understood all of these limitations on its power, and the district court applied the relevant statute and guideline as both Congress and the Commission intended.

B.

[2] Neal next contends that using a presumptive weight to calculate the base offense level and the actual weight to determine eligibility for the mandatory minimum sentence creates an illogical and arbitrary distinction between defendants that violates the Due Process Clause of the Fifth Amendment. A statute runs afoul of the Due Process Clause only if it "manifests a patently arbitrary classification, utterly lacking in rational justification." *Weinberger v. Salfi*, 422 U.S. 749, 768, 95 S.Ct. 2457, 2468, 45 L.Ed.2d 522 (1975); *see also United States v. Lawrence*, 951 F.2d 751, 754 (7th Cir.1991). Moreover, the statute's justification need not be expressly articulated or readily apparent "so long as a court can divine some rational purpose." *United States v. Cyrus*, 890 F.2d 1245, 1248 (D.C.Cir.1989) (citation omitted).

[3] In *Chapman*, the Supreme Court expressly found that Congress had a rational basis for the market-oriented sentencing scheme reflected in 21 U.S.C. § 841(b)(1)(B)(v):

> By measuring the quantity of drugs according to the "street weight" of the drugs in the diluted form in which they are sold, rather than according to the net weight of the active component, the statute and the Sentencing Guidelines increase the penalty for persons who possess large quantities of drugs, regardless of their purity. That is a rational sentencing scheme.

500 U.S. at 465, 111 S.Ct. at 1927–28. Subsequently, the Commission decided to establish a presumptive weight per dose of LSD for purposes of determining the defendant's base level "[b]ecause the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself." U.S.S.G. § 2D1.1 Commentary. As a result of this "dual weight" scheme, a defendant who is accountable for no more than approximately 104 doses on blotter paper like Neal's may receive a sentence ranging from probation to a few months imprisonment, *see* U.S.S.G. § 5C1.1, comment (n. 3), while a defendant who exceeds that threshold will qualify for a mandatory minimum five-year sentence.[5] In such circumstances, the statutory mandatory minimum creates a very steep "cliff" for the unlucky drug dealer who is caught distributing a few more doses than a more fortunate cohort. While this may be an ill-advised policy that metes out a severe punishment, it does have a rational basis—those who deal more LSD will be punished more heavily than those who deal less, and at a certain point there is a qualitative leap in the seriousness of the deed that will give rise to a sudden rather than an incremental increase. Such judgments are for Congress, not the courts, and we will not interfere with them.

[4] Neal also asks us to invoke the rule of lenity in view of an alleged ambiguity engendered by using two different methods to determine the weight of LSD for sentencing purposes. "[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812, 91 S.Ct. 1056, 1059, 28 L.Ed.2d 493 (1971). However, the rule of lenity is inapplicable unless there is a "grievous ambiguity or uncertainty in the language and structure of the Act," *Huddleston v. United States*, 415 U.S. 814, 831, 94 S.Ct. 1262, 1272, 39 L.Ed.2d 782 (1974), such that even after a court has "seize[d] everything from which aid can be derived," it is "left with an ambiguous statute." *United States v. Bass*, 404 U.S. 336, 347, 92 S.Ct. 515, 522, 30 L.Ed.2d 488 (1971) (quoting *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386, 2 L.Ed. 304 (1805)); *see also United States v. Shabani*, — U.S. —, —, 115 S.Ct. 382, 386, 130 L.Ed.2d 225 (1994) ("The rule of lenity, however, applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute.").

Such ambiguity does not exist here. The statute and sentencing guidelines clearly instruct the court to impose a minimum ten-year sentence if the weight of any LSD and its carrier medium exceed 10 grams. Neal has presented nothing to this court to undermine that conclusion, and that conclusion does not produce consequences "so absurd or glaringly unjust" as to make us reconsider whether the result comports with Congress' intent. *United States v. Rodgers*, 466 U.S. 475, 484, 104 S.Ct. 1942, 1948, 80 L.Ed.2d 492 (1984). As such, the rule of lenity does not apply.

D.

Finally, we note that every other court to have considered this issue has arrived at the same conclusion we have. *See United States v. Purvis*, 36 F.3d 429 (5th Cir.1994); *Cox v. United States*, 35 F.3d 565 (6th Cir.1994) (table) (unpublished opinion, text at 1994 WL 443250, 1994 U.S.App. Lexis 22188); *United States v. Dimeo*, 28 F.3d 240 (1st Cir.1994); *United States v. Mueller*, 27 F.3d 494 (10th

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1. In *Chapman*, the Supreme Court expressly interpreted only § 841(b)(1)(B)(v) and not § 841(b)(1)(A)(v). The two provisions, however, are nearly identical and only differ in what number of grams of LSD will result in what minimum sentence. No reason exists to interpret them differently, and Neal has not suggested that we do this.

4. Neal suggests that the per dose calculation, in assigning a presumptive weight of 0.4 milligrams per dose of LSD (a presumptive weight of 0.05 milligrams to the pure LSD dosage and 0.35 milligrams to the carrier), does "assign some weight to the carrier medium" and is therefore an appropriate interpretation of *Chapman*. Such a reading conflicts with the language of *Chapman* ("So long as it contains a detectable amount, the entire mixture or substance is to be weighed when calculating the sentence.") and is an untenable reinterpretation that the Commission neither adopted nor could have adopted.

5. For the defendant in *Chapman*, the number of doses triggering the mandatory minimum five-year imprisonment would have been about 175. *See Chapman*, 500 U.S. at 455–56, 111 S.Ct. at 1922–23. A defendant responsible for between 125 doses and 250 doses of LSD is eligible for imprisonment of only one-half the specific guideline range, followed by supervised release with a condition of community confinement or home detention. U.S.S.G. § 5C1.1, comment (n. 4).

Cir.1994); *United States v. Boot*, 25 F.3d 52 (1st Cir.1994); *United States v. Richardson*, 866 F.Supp. 1376 (S.D.Ala.1994); *United States v. Bugella*, 861 F.Supp. 77 (M.D.Fla. 1994); *United States v. Pirnat*, 859 F.Supp. 905 (E.D.Va.1994); *United States v. Kinder*, 853 F.Supp. 122 (D.Ver.1994); *see also United States v. Smith*, 39 F.3d 1143, 1146 n. 2 (11th Cir.1994) (noting but declining to address issue); *United States v. Staufer*, 38 F.3d 1103, 1108 n. 2 (9th Cir.1994) (same). A panel of the Eighth Circuit did issue an opinion contrary to this line of cases, *United States v. Stoneking*, 34 F.3d 651 (8th Cir. 1994), but that opinion was vacated pending rehearing *en banc*. 1994 WL 601482 (8th Cir. September 16, 1994). We see no occasion here to depart from the reasoned opinions of these courts and thereby create a circuit split.

III.

Congress has declined to follow a single approach to federal sentencing policy. In most cases, a defendant's sentence will be determined under the generally applicable Guidelines scheme which increases a defendant's sentence in rough proportion to the severity of the crime. For a few select classes of criminals (most notably, repeat offenders and large-scale drug dealers), however, Congress has enacted more stringent mandatory minimum sentences that abruptly depart from the Guidelines regime. By enhancing the punishment for distributing larger amounts of drugs (and by including the carrier medium in the computation of the quantity of drugs attributed to the defendant), Congress acted within its province. The Guidelines amendment creating a presumptive weight for purposes of calculating a defendant's base offense level, in effect, cuts small scale dealers a break by making them eligible for shorter sentences, and even probation. However, as the Commentary made clear, the amendment did not (and, in our view, could not) trump the statutory mandatory minimum provisions. Under *Stinson v. United States*, — U.S. —, —, 113 S.Ct. 1913, 1919, 123 L.Ed.2d 598 (1993), the Commission may reconcile conflicting judicial interpretations of the Guidelines by clarifying the Guidelines, as it did through Amendment 488. However, nothing in *Stinson* suggests that a Guidelines amendment can resolve a conflict between the Guidelines and a statute with respect to the meaning of a statutory term. The Supreme Court has authoritatively construed the term at issue in this case, and, in the absence of either Congressional amendment or clarification of the statute or a reinterpretation of the relevant language by our judicial superiors, we, like the Commission, are bound by *Chapman* for the purpose of applying the mandatory minimum scheme. The district court properly applied the Sentencing Guidelines.

AFFIRMED.

RIPPLE, Circuit Judge, with whom CUMMINGS and ROVNER, Circuit Judges, join, dissenting.

This case presents a straightforward task that ought to be easily accomplished—the sentencing of a person who has been convicted of distributing LSD. Several provisions of law must be considered. However, the harmonization of those provisions is quite a bit less complicated than the circuitous approach taken by the majority. The judiciary has an obligation to presume that those who sit in the Congress intend that the country be governed by a sentencing system that, although composed of both mandatory minimum sentences and the guideline ranges, operates as an integrated and fair system of criminal justice.

The sections that follow first set forth the approach to sentencing LSD offenders now sanctioned by the Congress and explain why that approach is supported by well-established principles. Finally, the legal and practical infirmities inherent in the approach now adopted by the majority are addressed.

A.

In determining the appropriate sentencing methodology, we must begin with the statute. Section 841(a) of Title 21 proscribes the distribution of certain substances, including LSD. Section 841(b)(1)(B)(v) establishes a mandatory minimum sentence for a conviction of distribution of certain amounts of a

"mixture or substance" containing "a detectable amount" of LSD.

Pursuant to its statutory authority to set sentencing ranges for the distribution of contraband substances, including LSD, the United States Sentencing Commission has set a range of terms of imprisonment for violations of the statute. These terms of imprisonment are correlated to the weight of the controlled substance. Therefore, U.S.S.G. § 2D1.1(c), the Drug Quantity Table of the Guidelines, establishes sentencing ranges for narcotics violations of § 841; the length of a sentence increases proportionally with the increased quantity of the drug in question. In the case of LSD in a carrier medium, the Sentencing Commission, through a recent revision ("Amendment 488"), has set the range of sentences so that each dose of LSD has a presumptive weight of 0.4 mg. In the "Background" Commentary to § 2D1.1 that accompanies this recent revision, the Commissioners noted that the weights of carrier media differ widely. In order to avoid the injustice of disparate sentences caused solely by the varying weight of different carrier media used by different defendants, the Commission selected a fixed weight to ensure against unwarranted disparity in sentences. The Commission also noted that assigning a fixed weight to the medium was necessary to ensure that those convicted of distributing LSD were not treated unfairly in comparison to defendants convicted of distributing other contraband substances even more dangerous than LSD.

In selecting 0.4 mg, the Commissioners noted that this weight exceeded the standard dosage unit of 0.05 mg for pure LSD calculated by the Drug Enforcement Administration. It justified that higher weight on the ground that justice required that a carrier medium be calculated evenhanded into the sentencing determination. The Commission gave two reasons for this inclusion of the carrier medium: (1) The weight most controlled substances in the Drug Quantity Table includes the amount of a carrier medium; (2) In *Chapman v. United States*, 500 U.S. 453, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991), the Supreme Court interpreted the statutory section imposing a mandatory minimum sentence for the distribution of a single gram or more of a mixture or substance containing LSD to require the inclusion of the carrier medium within the weight calculation. Therefore, in promulgating this method of calculating the weight of LSD in Amendment 488 after the Supreme Court's decision in *Chapman*, the Commission expressly addressed the need to comply with the Supreme Court's interpretation of the statute in *Chapman*. Congress, having been explicitly advised of this change and of the Commission's interpretation of the Supreme Court's reading of the statute, took no action to countermand the Commission's promulgation. Therefore, the Sentencing Guideline's § 2D1.1(c), as revised by Amendment 488, is consistent with 21 U.S.C. § 841(b). It fully takes into account the Supreme Court's interpretation of § 841(b) in *Chapman* with respect to the mandatory minimum sentence provision. Accordingly, it should govern the weight calculations of controlled substances for sentencing determinations.[1]

1. The following Circuits have addressed the issue in holding or dictum:
First Circuit: *United States v. Dimen*, 28 F.3d 240, 241 (1st Cir.1994) (noting that a reduction in the mandatory minimum sentence would be inconsistent with the Commission's statement that Amendment 488 did not override "the applicability of 'mixture or substance' for the purpose of applying any mandatory minimum sentence."); *United States v. Boot*, 25 F.3d 52, 55 (1st Cir. 1994) (stating that "Congress simply acquiesced in the restrictive reach of Amendment 488 duly noted by the Commission").
Fifth Circuit: *United States v. Perdue*, 36 F.3d 429, 431 (5th Cir.1994) (per curiam) (focusing on the "does not override" language in the Background Commentary to § 2D1.1(c) and finding that this language "leads to the inescapable conclusion that the mandatory minimum of § 84 calculated according to *Chapman*, overrides retroactive application of the new guideline
Sixth Circuit: *Cox v. United States*, No. 94-30 1994 WL 443250, at *2, 1994 U.S.App. Lx 22188, at *4 (6th Cir.1994) (unpub. order) (fin ing that district court's refusal to order senter below mandatory minimum "finds support in plain language" of guideline § 5G1.1(b) and Background Commentary to § 2D1.1).
Seventh Circuit: *United States v. Sazzi*, 33 F 56, 1994 U.S.App. Lexis 22932 (7th Cir.19 (unpub. order) (citing *Boot* and "does not override" language of the Background Comment and noting that Commission had not overrid

B.

In stark contrast to the Commission's attempt, with the approval of the Congress, to maintain fairness in sentencing, the majority adopts an alternate approach, the so-called "dual weight" system of calculating LSD weight. Under that approach, a sentencing court first must use the actual weight of the controlled substance combined with its medium to determine whether the offender requires the mandatory minimum sentence. If the offender does not fall off the "cliff" and incur the mandatory minimum sentence, the court must then recalculate the sentence on the basis of the presumptive weight.

The majority suggests that this approach is consistent with the revised Guidelines. To support this assertion, it depends, without any heed to context, on an interpretation of two sentences of the revised guideline commentary. It first notes, adding its own emphasis, that the Commission wrote that the presumptive weight was established "*for purposes of determining the base offense level.*" Opinion at 1408 (emphasis supplied). It then quotes, again adding its own emphasis: "'[T]his approach *does not override* the applicability of "mixture or substance" for the purpose of applying any mandatory minimum sentence.'" *Id.* (emphasis supplied). Reading these two sentences in isolation and with the assistance of its own emphasis, the majority concludes that the Sentencing Commission intended, and the Congress agreed, that the determination of whether the mandatory minimum sentence was required would be made without reference to the weight established by the revised guideline.[2] However, these isolated selections make a great deal more sense when they are read in the context of the entire explanation given in the paragraphs above those sentences.[3] Read in

Chapman), *petition for cert. filed.* (Nov. 21, 1994) (No. 94-7094).

Eighth Circuit: *United States v. Saowaking*, 34 F.3d 651 (8th Cir.1994) (rejecting dual weight analysis in favor of uniform application of presumptive weight), *vacated*, 1994 WL 601482, 1994 U.S.App. Lexis 30466 (8th Cir. Sept. 16, 1994) (ordering rehearing en banc and scheduling argument for December 6, 1994).

Tenth Circuit: *United States v. Mueller*, 27 F.3d 494, 496-97 (10th Cir.1994) (concluding, in a case in which the defendant had received a reduction below the applicable mandatory minimum sentence pursuant to Fed.R.Crim.P. 35, that the defendant was not entitled to any further reductions because he was subject to a mandatory minimum at the time he was sentenced, but failing to analyze whether Amendment 488 could be read in harmony with the Supreme Court's decision in *Chapman*).

Two Circuits have reserved ruling on the question:

Ninth Circuit: *United States v. Staufer*, 38 F.3d 1103, 1108 n. 2 (9th Cir.1994) ("We express no view as to the effect of the Amendment [488] on the calculation of the mandatory minimums in light of the Supreme Court's decision in *Chapman v. United States*[.]").

Eleventh Circuit: *United States v. Smith*, 39 F.3d 1143, 1146 n. 2 (11th Cir.1994) ("We express no opinion as to whether the drug quantity determination at sentencing is to be governed by the recent amendment to the sentencing guidelines ... or by the rule set down by the Supreme Court in *Chapman*.").

2. The opinion of the First Circuit in *Boot* focuses on the second of these sentences and claims that it alone is relevant: "Without more—and there is no more[,]" *Boot*, 25 F.3d at 33. But, as the following footnote demonstrates, there is a great deal more.

3. Amendment 488 provided, in pertinent part, that:

> The Commentary to § 2D1.1 captioned "Application Notes" is amended by inserting the following additional note:
>
> "18. LSD on a blotter paper carrier medium typically is marked so that the number of doses ('hits') per sheet readily can be determined. When this is not the case, it is to be presumed that each ¼ inch by ¼ inch section of the blotter paper is equal to one dose. In the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted.".
>
> The Commentary to § 2D1.1 captioned "Background" is amended by inserting the following paragraphs at the end:
>
> "Because the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself, the Commission has determined that basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD (but different carrier weights), as well as sentences disproportionate to those for other, more dangerous controlled substances, such as PCP. Consequently, in cases involving LSD contained in a carrier medium, the Commission has established a weight per dose of 0.4 milligram for purposes of determining the base offense level.

context, these sentences summarize the goals accomplished by the Commission in the amendment: (1) It harmonized offense levels for different controlled substances; (2) It lessened the "undue influence" that different carrier weights would have on the offense level; and (3) It took into account *Chapman*'s interpretation of the terms "mixture or substance" when applying a mandatory minimum sentence.

> The dosage weight of LSD selected exceeds the Drug Enforcement Administration's standard dosage unit for LSD of 0.05 milligram (*i.e.*, the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard to purity, and (B) the decision in *Chapman v. United States*, [500 U.S. 453,] 111 S.Ct. 1919, [114 L.Ed.2d 524] (1991) (holding that the term 'mixture or substance' in 21 U.S.C. § 841(b)(1) includes the carrier medium in which LSD is absorbed). At the same time, the weight per dose selected is less than the weight per dose that would equate the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. (Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent to those for PCP.) Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. Nonetheless, this approach does not override the applicability of 'mixture or substance' for the purpose of applying any mandatory minimum sentence (see *Chapman*; § 5G1.1(b)).".
>
> The Commission has found that the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself (*e.g.*, LSD is typically placed on blotter paper which generally weighs from 5 to 10 milligrams per dose; the weight of the LSD itself per dose is generally from 0.02 to 0.08 milligram; the Drug Enforcement Administration describes a standard dose of LSD as containing 0.05 milligram of LSD). As a result, basing the offense level on the entire weight of the LSD and carrier medium produces unwarranted disparity among offenses involving the same quantity of actual LSD but different carrier weights, as well as sentences that are disproportionate to those for other, more dangerous controlled substances, such as PCP, heroin, and cocaine. Under the guidelines prior to the amendment, for example, 100 grams of heroin or 500 grams of cocaine (weights that correspond to several thousand doses, the number depending upon the purity) result in the same offense level as 125 doses of LSD on blotter paper (which has an average weight of 8 milligrams per dose); or 1 dose of LSD on a sugar cube (2000 milligrams per dose). Consequently, in cases involving LSD contained in a carrier medium, this amendment establishes a weight per dose of 0.4 milligram to be used for purposes of determining the base offense level. The dosage weight of LSD selected by the Commission exceeds the Drug Enforcement Administration's standard dosage unit for LSD of 0.05 milligram (*i.e.*, the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard to purity, and (B) the decision in *Chapman v. United States*, 500 U.S. 453, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991) (holding that the term "mixture or substance" in 21 U.S.C. § 841(b)(1) includes the carrier medium in which LSD is absorbed). At the same time, the weight per dose selected is less than the weight per dose that would equate the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent to those for PCP (for example, 2000 doses of LSD at 0.5 milligram per dose equals 1 gram of LSD—corresponding to the lower limit of offense level 26; similarly, 2000 doses of PCP at 5 milligrams per dose, the standard amount of actual PCP in a dose, equals 10 grams of actual PCP—corresponding to the lower limit of offense level 26). Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. Nonetheless, this approach does not override the definition of mixture or substance for purposes of applying any mandatory minimum sentence (see *Chapman*; § 5G1.1(b)). The effective date of this amendment is November 1, 1993. ...

Any lingering doubt as to the appropriate reading of the guideline commentary ought to be dispelled by an examination of the practical effect of the majority's interpretation. Under the "dual weight" method of calculation, an LSD trafficker would receive

the mandatory minimum sentence of five years for one gram or more of LSD by selling LSD in approximately one-half of a sugar cube or 125 blotter paper squares. *See* U.S.S.G. amend. 488 (noting that average weights of sugar cube and blotter square are 2000 mg and 8 mg, respectively); *cf. Chapman*, 500 U.S. at 458 n. 2, 111 S.Ct. at 1924 n. 2 (reproducing chart in which weights of various carrier media are listed; using these weights, a dealer could qualify for the five-year mandatory minimum by selling LSD in approximately one-half of a sugar cube, 72 blotter paper squares, or 445 gelatin capsules). By contrast, under the Sentencing Commission's method, whether an LSD trafficker receives the five-year mandatory minimum sentence will not depend on the type of medium he happens to use but on the number of doses he sells.

We ought not attribute to the Commission or to the Congress the injustice produced by the majority's interpretation. Until today, we have acknowledged that, although Congress has chosen to address sentencing policy issues through both statutes and sentencing guidelines, courts ought not presume lightly that it intended these two vehicles of the legislative will to work at odds with each other. Indeed, with respect to mandatory minimum sentences, we have explicitly noted that Congress did not intend to employ through the mandatory minimum sentence a scheme "so completely at odds with the measured approach required by the Guidelines." *United States v. Young*, 997 F.2d 1204, 1210 (7th Cir.1993); *see also United States v. Martinez*, 987 F.2d 920, 926 (2d Cir.1993) (same); *cf. United States v. Edwards*, 945 F.2d 1387, 1396 (7th Cir.1991) (explaining that "the limiting principle [of conspiracy liability] underlying conspiracy law and the Guidelines is essentially one and the same"), *cert. denied*, — U.S. —, 112 S.Ct. 1590, 118 L.Ed.2d 308 (1992). Here, the Sentencing Commission established a methodology for attributing a weight to the dose of LSD that took into account, as the statute setting the mandatory minimum requires, the weight of the carrier medium. It therefore harmonized its setting of graduated, weight-based sentences with the command of the mandatory statute. Congress has had the opportunity to scrutinize and approve the Commission's work.[4] After the amended § 2D1.1 was sent to Congress for review, it took effect without modification or delay, and hence with congressional approval, in November 1993. We ought not presume that the Congress was derelict in its duty to scrutinize the workproduct of the Commission. We certainly ought not assume that Congress has made conflicting policy decisions, especially when those decisions can be so easily reconciled.

Nor is it appropriate to lay the blame for the result reached today on the doorstep of the Supreme Court. *Chapman* does not require the result reached by the majority. In *Chapman*, the Supreme Court was asked to decide whether eligibility for the mandatory minimum sentence under 21 U.S.C. § 841(b) was to be determined by the weight of the pure LSD or of the carrier medium containing the LSD. It held that the mandatory minimum statute "requires the weight of the carrier medium to be included when determining the appropriate sentence for trafficking in LSD." 500 U.S. at 468, 111 S.Ct. at 1929. The Supreme Court was presented with only two choices in *Chapman*: to count either the infinitesimal weight of the pure LSD contained in a dose or the entire weight of the dose and the blotter paper. Faced with that choice, and in keeping with the market-oriented approach adopted by the Guidelines, the Court could only choose the weight of the pure drug and its carrier. Two years later, the Sentencing Commission, acknowledging *Chapman*, amended § 2D1.1. It assigned a standard dosage weight of 0.05 mg to a unit of pure LSD and a weight of 0.35 mg to the carrier medium in order to "harmonize offense levels" for different controlled substances and to balance the influence that different carrier weights would have on the applicable offense level for an LSD offense. This approach, explained the Commission, is faithful to the holding of *Chapman*. U.S.S.G. § 2D1.1, comment. (backg'd.). Amendment 488 simply assigns a rational and uniform weight to that portion of

4. *See* 28 U.S.C. § 994(p).

the carrier that can be said to be bonded or mixed with the drug. The amendment therefore satisfies *Chapman*'s interpretation of the mandatory minimum statute that the weight assigned to the LSD include the weight of the carrier medium. It retains the "market-oriented" approach, under which the total quantity of drugs distributed, rather than the amount of pure drug sold, is used to determine the length of the sentence. By assigning a weight per dose that is eight times the actual weight of the pure drug, the Sentencing Commission has determined, in effect, that 0.05 mg of LSD can be absorbed in a carrier eight times its weight. Thus, Amendment 488 remains true to the *Chapman* mandate that the weight of the carrier must be included if the carrier can be said to be bonded with or mixed with the drug. At the same time, it promotes the sentencing uniformity that has been at the heart of the Congress' effort to achieve sentencing reform. Years of incarceration and thousands of public dollars to support that incarceration ought not depend on whether the drug trafficker used blotter paper or sugar cubes as a medium.

The amendment was a refinement of the earlier practice of weighing on an ad hoc basis whatever carrier the defendant happened to use. Such a refinement of the sentencing scheme through the action of the Commission, with the knowledge and the consent of the Congress, is an expected and necessary part of the process contemplated by the present sentencing scheme. As the Supreme Court recently noted:

> Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest.

Stinson v. United States, — U.S. —, —, 113 S.Ct. 1913, 1919, 123 L.Ed.2d 598 (1993) (quoting *Braxton v. United States*, 500 U.S. 344, 348, 111 S.Ct. 1854, 1858, 114 L.Ed.2d 385 (1991)). The Sentencing Commission has interpreted properly the Supreme Court's requirement that the carrier weight be included. By stating that its "approach does not override the applicability of mixture or substance for the purpose of applying any mandatory minimum sentence," the Commission has recognized the continued viability of the mandatory minimum sentence whenever the weight of the LSD is calculated by the method stated in § 2D1.1. Congress did not challenge that revision. It is this court's responsibility to read the statutory sentencing provisions and the Guidelines as a consistent whole that expresses the intent of the Congress. *See United States v. Young*, 34 F.3d 500, 506 (7th Cir.1994). The sentence ought to be vacated and the case remanded for resentencing.

LANDSCAPE PROPERTIES, INC., Debtor in Possession, Appellant,
v.
Robert A. VOGEL, Richard C. Downing, Joe D. Whisenhunt, Appellees,
Wingfield Martin; Milton T. Schaeffer, Defendants.

No. 94-1234.

United States Court of Appeals, Eighth Circuit.

Submitted Nov. 16, 1994.

Decided Feb. 2, 1995.

Chapter 7 trustee brought damages action alleging collusion among bidders at bankruptcy sale. The United States District Court for the Eastern District of Arkansas, Stephen M. Reasoner, Chief Judge, dismissed complaint. Trustee appealed. The Court of Appeals, 970 F.2d 471, reversed and remanded. On remand, after conversion of case to Chapter 11, the District Court entered judgment on jury verdict in favor of bidders. Chapter 11 debtor in possession appealed. The Court of Appeals, Friedman, Senior Circuit Judge, sitting by designation,

FILED

UNITED STATES DISTRICT COURT
Central District of Illinois

MAR 2 9 1994

JOHN M. WATERS, Clerk
U. S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA

v. Case Number CR 88-30020

MEIRL GILBERT NEAL
Defendant.

AMENDED
Judgment of 6/19/89 is Vacated.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Resentencing upon amendments to sentencing guidelines:

The defendant, MEIRL GILBERT NEAL, was represented by Michael Costello.

The defendant pleaded guilty to count(s) 1 & 2. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC 846	Conspiracy to Distribute and Distribution of LSD	3/17/88	1
21 USC 841(a)(1)	Possession with Intent to Distribute LSD	3/17/88	2

As pronounced on 3/28/94, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 29th day of March, 1994.

Richard Mills
United States District Judge

APPENDIX B

Defendant's SSAN: 354-32-7547
Defendant's Date of Birth: 11/11/40
Defendant's address: c/o U.S. Marshal; 600 E. Monroe; Springfield, IL 62701

APPENDIX B

Defendant: MEIRL GILBERT NEAL
Case Number: CR 88-30020

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 120 months on each court to run concurrently.

The defendant is remanded to the custody of the United States Marshal.

The defendant is given credit for time served.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: MEIRL GILBERT NEAL
Case Number: CR 88-30020

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.

3. The defendant shall not own or possess a firearm, ammunition, or destructive device.

4. The defendant shall participate in a substance abuse program, which may include urinalysis at the direction of, and in the discretion of the U.S. Probation Office.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4) The defendant shall support his or her dependents and meet other family responsibilities.
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except: (see attachment, if necessary)

OR

☐ The court adopts the factual findings and guideline application from the Plea Agreement and information presented at the sentencing hearing. The court finds, pursuant to Federal Rule of Criminal Procedure 32(c)(1), that there is sufficient information in the record to waive the presentence report.

Guideline Range Determined by the Court:

Total Offense Level: 25
Criminal History Category: III
Imprisonment Range: 70 to 87 months; Mand. Min. 120 months
Supervised Release Range: 3 to 5 years; Statutory Term __ years
Fine Range: $10,000 to $8,000,000

☒ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

☐ Community service in lieu of fine.

Restitution: $ 1,460

☐ Full restitution is not ordered for the following reason(s):

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): punishment and deterrence.

OR

The sentence departs from the guideline range

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following reason(s):

Dated this 29th day of March, 1994

Richard Mills
RICHARD MILLS
United States District Judge

AO 245 S (3/88) Sheet 1 - Judgment Including Sentence Under the Sentencing Reform Act

FILED
JUN 19 1989
JOHN M. WATERS, Clerk
U. S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

United States District Court

CENTRAL District of ILLINOIS

UNITED STATES OF AMERICA

V.

MEIRL GILBERT NEAL

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number 88-30020-01

(Name of Defendant)

Michael Costello
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 and 2 .
☐ was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
T. 21, Sec. 846	Conspiracy to Distribute and Distribution of LSD (10 Grams or More)	1
T. 21, Sec. 841(a)(1)	Possession With Intent to Distribute LSD (10 Grams or More)	2

The defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).
☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.
☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
☒ It is ordered that the defendant shall pay to the United States a special assessment of $ 100.00 , which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
354-32-7547

Defendant's mailing address:
937 N. Indiana Street
Springfield, IL 62702

Defendant's residence address:
937 N. Indiana Street

JUNE 19, 1989
Date of Imposition of Sentence

Signature of Judicial Officer

RICHARD MILLS, U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

JUNE 19, 1989
Date

APPENDIX C

AO 245 S (3/88) Sheet 2 - Imprisonment

Defendant: MEIRL GILBERT NEAL
Case Number: 88-30020-01

Judgment—Page 2 of 7

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 192 months on each Count, to run concurrently.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.
☒ The defendant shall surrender to the United States Marshal for this district,

☒ at 1:30 ~~a.m.~~ p.m. on June 26, 1989 .

☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.
☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

United States District Court

FILED
JUN 19 1989
JOHN M. WATERS, Clerk
U. S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

CENTRAL District of ILLINOIS

UNITED STATES OF AMERICA

V.

MEIRL GILBERT NEAL

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number 88-30020-01

(Name of Defendant)

Michael Costello
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 and 2.
☐ was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
T. 21, Sec. 846	Conspiracy to Distribute and Distribution of LSD (10 Grams or More)	1
T. 21, Sec. 841(a)(1)	Possession With Intent to Distribute LSD (10 Grams or More)	2

The defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).
☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.
☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
☒ It is ordered that the defendant shall pay to the United States a special assessment of $ 100.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
354-32-7547

JUNE 19, 1989
Date of Imposition of Sentence

Defendant's mailing address:
937 N. Indiana Street
Springfield, IL 62702

Signature of Judicial Officer

RICHARD MILLS, U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

Defendant's residence address:
937 N. Indiana Street

JUNE 19, 1989
Date

APPENDIX C

Defendant: MEIRL GILBERT NEAL
Case Number: 88-30020-01

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 192 months on each Count, to run concurrently.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.
☒ The defendant shall surrender to the United States Marshal for this district,

☒ at 1:30 p.m. on June 26, 1989.

☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

☐ before 2 p.m. on _____.
☐ as notified by the United States Marshal.
☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: MEIRL GILBERT NEAL
Case Number: 88-30020-01

PROBATION

The defendant is hereby placed on probation for a term of _____.

While on probation, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this Judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution. The defendant shall comply with the following additional conditions:

Defendant: MEIRL GILBERT NEAL
Case Number: 88-30020-01

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;
2) the defendant shall not leave the judicial district without the permission of the court or probation officer;
3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
5) the defendant shall support his or her dependents and meet other family responsibilities;
6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;
8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

Defendant: MEIRL GILBERT NEAL
Case Number: 88-30020-01

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $ _____ , consisting of a fine of $ _____ and a special assessment of $ _____ .

☐ These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

This sum shall be paid ☐ immediately.
☐ as follows:

☐ The Court has determined that the defendant does not have the ability to pay interest. It is ordered that:

☐ The interest requirement is waived.
☐ The interest requirement is modified as follows:

Defendant: MEIRL GILBERT NEAL
Case Number: 88-30020-01

RESTITUTION, FORFEITURE, OR OTHER PROVISIONS OF THE JUDGMENT

AMENDMENT V TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

Title 21 U.S.C. § 841(b)(1)(A)(v)

(b) Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:. . .

(1)(A) In the case of a violation of subsection (a) of this section involving-. . .

> (v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);. . .

such a person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provision of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both.

APPENDIX E

U.S.S.G. § 2D1.1(c)

§ 2D1.1(c) is amended in the notes following the Drug Quantity Table by inserting the following additional paragraph at the end:

> In the case of LSD on a carrier medium (e.g., a sheet of blotter paper), do not use the weight of the LSD carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table."

The Commentary to Sec. 2D1.1 captioned "Application Notes" is amended by inserting the following additional note:

> LSD on a blotter paper carrier medium typically is marked s that the number of doses ("hits") per sheet readily can be determined. When this is not the case, it is to be presumed that each 1/4 inch by 1/4 inch section of the blotter paper is equal to one dose.
>
> In the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted."

The Commentary to Sec. 2D1.1 captioned "Background" is amended by inserting the following paragraphs at the end:

> Because the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself, the Commission has determined that basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD (but different carrier weights), as well as sentences disproportionate to those for other, more dangerous controlled substances, such as PCP. Consequently, in cases involving LSD contained in a carrier medium, the Commission has established a weight per dose of 0.4 milligram for purposes of determining the base offense level.
>
> The dosage weight of LSD selected exceeds the Drug Enforcement Administrations's standard dosage unit for LSD of 0.05 milligram (i.e., the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard t purity, and (B) the decision in Chapman v. United States, 111 S.Ct. 1919 (1991) (holding that the term "mixture of substance" in 21 U.S.C. Sec. 841(b)(1) includes the carrier medium in which LSD is absorbed). At the same time, the weight per dose

a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent t those for PCP (for example, 2000 doses of LSD at 0.5 milligram per dose equals 1 gram of LSD - corresponding to the lower limit of offense level 26; similarly, 2000 doses of PCP at 5 milligrams per dose, the standard amount of actual PCP in a dose,equals 10 grams of actual PCP - corresponding to the lower limit of offense level 26). Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. Nonetheless, this approach does not override the definition of mixture or substance for purposes of applying any mandatory minimum sentence (see Chapman; Sec. 5G1.1(b)).

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ORIGINAL

94-8068

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

No._____

Supreme Court, U.S.
FILED
MAY 2 1995
OFFICE OF THE CLERK

MEIRL GILBERT NEAL, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

PROOF OF SERVICE

I, Michael J. Costello, do swear or declare that on this date, May 1, 1995, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepared:

The names and addresses of those served are as follows:

Byron Cudmore
Assistant U.S. Attorney
Federal Building
600 East Monroe
Springfield, Illinois 62701

Solicitor General
Department of Justice
Washington, D.C. 20530

MICHAEL J. COSTELLO

Subscribed and sworn to before me this 1st day of May, 1995.

NOTARY PUBLIC

OFFICIAL SEAL
ANGELIA D. JOOS
NOTARY PUBLIC - STATE OF ILLINOIS
My Commission Expires December 12, 1997

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
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NO._____

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STATEMENT OF FILING BY MAIL PURSUANT TO SUPREME COURT RULE 28.2

The undersigned, Michael J. Costello, Attorney at Law, and a member of the Bar of this Court, under oath, states that he filed, within the time prescribed, the above-captioned Petition for Writ of Certiorari and Motion for Leave to File In Forma Pauperis, by mailing same in an envelope, first-class mail, postage prepaid, and depositing same in the United States Post Office, 600 West Monroe, Springfield, Illinois 62701, addressed to:

Clerk of the Supreme Court
of the United States
1 First Street, N.E.
Washington, D.C. 20543

this 1ST day of May, 1995.

Michael J. Costello

STATE OF ILLINOIS)
) ss
COUNTY OF SANGAMON)

SUBSCRIBED AND SWORN to before me this 1ST day of May, 1995.

OFFICIAL SEAL
ANGELIA D. JOOS
NOTARY PUBLIC - STATE OF ILLINOIS
Commission Expires December 12, 1997

NOTARY PUBLIC

CERTIFICATE OF SERVICE

The undersigned does hereby certify that the foregoing document was served on the following by enclosing same in an envelope addressed as shown and by depositing said envelope in the United States Mail in Springfield, Illinois on this 1ST day of May, 1995:

Byron Cudmore
Assistant U.S. Attorney
Federal Building
600 East Monroe
Springfield, Illinois 62701

Solicitor General
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